In the

# Supreme Court of the United States

October Term, 1950.

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No. 490.

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MIDWEST REFRIGERATION, INC., a Corporation, *Petitioner*,

vs.

J. F. BATEMAN, J. R. GALBRATH, E. J. DAVIS, JAMES H. MOORE, Statutory Trustees, etc., and STANDARD BRANDS, INC., a Corporation, *Respondents*.

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## REPLY BRIEF OF STANDARD BRANDS, INC., TO PETITION FOR A WRIT OF CERTIORARI,

to the

United States Court of Appeals for the Eighth Circuit.

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## ADDITIONAL STATEMENT OF FACTS.

Two fire insurance companies filed this action in the name of the statutory trustees of Batemore, Inc., a dissolved corporation (R. 17). Batemore, Inc., prior to its dissolution, was the owner of a building in Kansas City, Missouri, being leased in 1916 to Standard Brands, Inc. (R. 37). The building, insured against fire loss (R. 304) by the two fire insurance companies (R. 158, 159) was

damaged by a fire on June 26, 1946 (R. 296). A repairman from Midwest Refrigeration, Inc., was replacing the bellows on the pressure switch used in the air-conditioning unit. He permitted the refrigerant to flood and break the head of the compressor of the unit. The refrigerant escaped and became ignited (R. 276).

The two fire insurance companies paid to Batemore, Inc., the sum of $39,875. They brought suit against Standard Brands to recover the $39,875 (R. 317). Standard Brands then filed a third party complaint against Midwest Refrigeration, whose employee, Blosser, the repairman, was replacing the bellows on the pressure switch on the air-conditioning unit in the building at the time the refrigerant escaped (R. 275, 276, 298).

At the close of all of the testimony the district court directed the jury to return a verdict in favor of Midwest Refrigeration (R. 320). The court overruled the motion of Standard Brands for a directed verdict (R. 327). The court then submitted the case to the jury under an instruction which told the jury that Standard Brands was liable for the negligence of Blosser, the employee of Midwest Refrigeration (R. 318).

The jury returned a verdict in favor of the plaintiffs in the sum of $39,875 (R. 322). Judgment was entered in favor of the plaintiffs and against Standard Brands (R. 324). Judgment was also entered in favor of Midwest Refrigeration and against Standard Brands (R. 324).

The Circuit Court of Appeals affirmed the judgment in favor of the plaintiffs and against Standard Brands on the ground that paragraphs 2 and 3 of the lease required the tenant to repair, and that the tenant was liable for fire loss caused by the negligence of an independent contractor while making those repairs. The lease was set out in toto in plaintiffs' petition and introduced into evidence by plaintiffs. The court held that paragraph 7 of

the lease which required the landlord to repair fire damage could not be considered (R. 353, 354, 345).

The Circuit Court of Appeals reversed the judgment in favor of Midwest Refrigeration and ordered a new trial on the issues in that case (R. 353). The opinion ruled that the agent was responsible to his principal for damages caused by the agent's negligence for which the principal was liable (R. 346). The court held that there was a conflict in the evidence of the independent contractor relationship and for that reason ordered a new trial.

Standard Brands has filed its petition for certiorari to this Court to review the judgment of the Circuit Court of Appeals in favor of the statutory trustees and against Standard Brands. Midwest Refrigeration has now filed its petition for certiorari to this Court to review the judgment which orders a new trial of the Standard Brands-Midwest action.

If Standard Brands is successful before this Court, then Midwest Refrigeration will also be successful. Its liability is based solely on the third party complaint of Standard Brands. The plaintiffs did not join Midwest Refrigeration as a defendant in their action.

Standard Brands by the testimony of its witnesses proved that the fire was caused by Blosser's negligence. On June 26, 1946, Standard Brands was employing a maintenance man by the name of Joe Schrader, whose duties were to start and stop the machinery and report any malfunctioning of the equipment (R. 297). He had been specifically instructed not to repair any air-conditioning equipment but to report any malfunctioning to his superiors (R. 297, 272).

About one or two weeks before June 26, 1946, Schrader had reported to the staff assistant of the operating manager of Standard Brands, Mr. Max Crawford, that the

air-conditioning was not properly cooling one of the offices (R. 298).

Mr. Crawford called Midwest Refrigeration, who were experts in the repair and maintenance of refrigeration and air-conditioning units, and the best in Kansas City. Mr. Crawford advised them that the air-conditioning unit was not functioning properly and asked them to come over and make the necessary repairs (R. 298, 85).

Mr. Blosser, an employee of Midwest Refrigeration, came over to the Standard Brands office and reported, on June 26, 1946, that he had been sent to repair the air-conditioning equipment (R. 298). Blosser was asked to repair the equipment and he was told that Schrader, the maintenance man, would show him where the machinery and equipment was located (R. 299).

Blosser used a torch leak detector and found a bad leak at the bellows of the pressure switch. Schrader, the maintenance man, had nothing whatever to do with the repair of this leak at the pressure switch (R. 94, 275). Blosser did not take proper precautions while making the repairs and allowed the liquid methyl chloride to escape into the compressor. He then turned on the pressure switch which caused the head of the compressor to break, thereby allowing the methyl chloride to escape. A fire was present in the boiler and the fire occurred.

**The Writ Should Be Limited to Review the Judgment for the Plaintiffs and Against Standard Brands.**

There is no conflict between the decision of the United States Court of Appeals for the Eighth Circuit and the applicable local law in the judgment awarding a new trial on the Standard Brands-Midwest part of the suit.

**(1) Under the local applicable law the relationship of Midwest and Standard Brands was that of independent contractor rather than master and servant.**

The Supreme Court of Missouri has many times adopted the tests used by the Restatement of the Law of Agency in determining whether any relationship is that of master and servant or that of an independent contractor. See *Mattan* v. *Hoover,* 350 Mo. 506, 166 S. W. 2d 557 (1942); *Skidmore* v. *Haggard,* 341 Mo. 837, 110 S. W. 2d 726 (1937); and *Bass* v. *Kansas City Journal-Post Co.,* 347 Mo. 681, 148 S. W. 2d 548 (1941).

The tests applied by the Supreme Court of Missouri as set out in Section 220, Restatement of the Law of Agency, are as follows:

> "(a) The extent of control which by the agreement, the master may exercise over the details of the work."

Standard Brands had no agreement whereby it could exercise control over the details of repairing the air-conditioning system. The evidence is undisputed that it did not exercise any control over the details of the work. The manner of repairing the pressure switch was left entirely to Midwest's employee, Blosser.

> "(b) Whether or not the one employed is engaged in a distinct occupation or business."

Midwest was an air-conditioning service company. Standard Brands was engaged in the sale of foods.

> "(c) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision."

The servicing and repair of air-conditioning units is universally done by specialists such as Midwest. The

replacement of a pressure switch on an air-conditioning unit is particularly a job for a specialist.

> "(d) The skill required in the particular occupation."

Replacing a pressure switch requires skilled and trained personnel.

> "(e) Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work."

The instrumentalities and tools were furnished by Midwest. The place of work was necessarily located at the Standard Brands office.

> "(f) The length of time for which the person is employed."

Midwest was employed only for the particular job of repairing malfunction in the operation of this air-conditioning unit. There was no fixed amount of time for the repair.

> "(g) The method of payment, whether by the time or job."

The record is silent as to the method of payment.

> "(h) Whether or not the work is a part of the regular business of the employer."

Standard Brands is in the business of selling foods, not repairing air-conditioning units.

> "(i) Whether or not the parties believe they are creating any master and servant relationship."

No one believed that Midwest in repairing the air-conditioning unit became the servant of Standard Brands.

It is apparent that all the factors point to an independent contractor relationship. It would be difficult to find a set of facts which more completely fulfill the tests of the independent contractor as set out above by the Restatement of Law of Agency and adopted by the Supreme Court of Missouri.

**(2) Blosser's negligence caused the fire.**

The Court of Appeals summarized the testimony in the trial court that the fire was caused by Blosser, stating as follows (R. 340):

> "Expert witnesses were produced by both parties from whose testimony it may fairly be said that the explosion could have been avoided (1) had the refrigerant been 'pumped down' into the receiver before making the repair on the pressure switch, (2) or had the valve on the compressor been closed, (3) or had the pressure switch been blocked, (4) or had the solenoid valve been closed. The solenoid valve was the valve through which the gas passed on its return from the rooms on the upper floors to the basement. *It is conceded that failure to take one or more of these essential precautions was negligence resulting in the fire.*" (Italics ours.)

It is equally difficult to find a set of facts which more completely show that Midwest, the independent contractor, was negligent in performing its work.

**(3) Under the local applicable law an agent who subjects his principal to liability because of a negligent or other wrongful act is himself subject to liability to the principal for the loss which results therefrom.**

Since Midwest, by its servant, Blosser, is the agent of Standard Brands and was negligent and its negligence caused the explosion, then it is liable to Standard Brands

for the total damage which its negligence caused Standard Brands to suffer.

In *State ex rel. Algiere* v. *Russell,* ..... Mo. ....., 223 S. W. 2d 481 (1949), the court quoted with approval the following from Section 401 of the Restatement of the Law of Agency (l. c. 483):

> " 'Unless he has been authorized to act in the manner in which he acts, the agent who subjects his principal to liability because of a negligent or other wrongful act is himself subject to liability to the principal for the loss which results therefrom. This includes the payment of damages by the principal to the third person, or of a fine to the State in case of a crime. Thus, a servant who, while acting within the scope of his employment, negligently injures a third person, although personally liable to such person, is also subject to liability to the principal if the principal is thereby required to pay damages. * * *' "

If Standard Brands is liable to the plaintiffs and is required to pay for the damage caused by the fire, then Midwest is in turn liable to Standard Brands for such payment. Midwest was guilty of the negligence which caused the fire.

The rule as advanced by Midwest that "the well-established exception to the rule that where the work to be done under the contract is inherently dangerous, then the responsibility cannot be shifted or delegated to an agent" is correct as far as it goes. That is to say, if a third person is injured by the negligence of an agent doing work that is inherently dangerous, then the principal will be liable to such third person. The rule does not, however, relieve the agent from liability to the principal for the amount of damages the principal is required to pay such third person. If this third person elects to sue only the

principal, then the principal cannot use as a defense the negligence of the agent or independent contractor. But this does not prevent the principal from then recovering back from the agent the loss he has suffered because of such agent's negligence. "The agent who subjects his principal to liability because of a negligent or other wrongful act is himself subject to liability to the principal for the loss which results therefrom." *State ex rel. Algiere* v. *Russell* (*supra*).

In *Busch and Latta Paint Co.* v. *Woermann Const. Co.*, 310 Mo. 419, 276 S. W. 614 (1925), the plaintiff had hired the defendant to build a scaffold for the plaintiff's employees. It was constructed negligently although defendant was engaged in the business of erecting scaffolds and had engineers skilled in that particular work. The scaffold fell and plaintiff was required to pay compensation to his employees on the theory that he had negligently failed to inspect the scaffold and be sure it was safe. Plaintiff then sued to recover these payments from the defendant. The defense was that the plaintiff and defendant were joint tort-feasors and therefore one cannot be made to indemnify the other. The Supreme Court held that "In all cases where one party creates the condition which causes the injury, and the other does not join therein, but is exposed to liability, and suffers damages on account of it, the rule that one of two joint tort-feasors cannot maintain an action against the other for indemnity does not apply" and the plaintiff was allowed to recover.

The same result was reached in *City of Springfield* v. *Clement*, 225 S. W. 120 (Sp. Ct. of App. 1920) where the City of Springfield was compelled to pay damages for injury to a person, caused by a defective sidewalk, and the city was allowed to recover against the owner of the property who permitted the sidewalk to became defective.

Midwest with its scientific and expert knowledge undertook to repair this air-conditioning system. Standard Brands was ignorant of what was necessary but in good faith thought Midwest was competent to perform the repairs and trusted them to do so in a safe way because they were experts in this field. The negligence that caused the fire was due solely to the negligence of Midwest's employee. This does not put the parties *in pari delicto.* So far as their relations to each other are concerned, it leaves them where they were before with Standard Brands being entitled to be indemnified for any loss which it might suffer because of the negligence of Midwest.

**Conclusion.**

Certiorari should be granted to review the judgment of the Court of Appeals holding that Standard Brands is liable to the plaintiffs. If Standard Brands is successful, then Midwest is not liable. Certiorari should not be granted to review the judgment of the Court of Appeals in the Standard Brands-Midwest action.

Respectfully submitted,

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